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No. 70-244

In the

Supreme Court of the United States

OCTOBER TERM, 1971

ROGER BOSHES, ESTHER K. ROERIG, CURTIS COLLUM, FRANK JACKSON and JAMES TAYLOR,
Petitioners.

vs.

GENERAL MOTORS CORPORATION and the HONORABLE WILLIAM J. CAMPBELL, Judge of the United States District Court for the Northern District of Illinois,
Respondents.

PETITIONERS' REPLY BRIEF ADDRESSED TO BRIEF IN OPPOSITION OF GENERAL MOTORS CORPORATION and APPENDIX E

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A. NEW MATTERS

Pursuant to Supreme Court Rule 24.5, we call the attention of this Court to certain new cases, to an amended rule of the District Court below and to other intervening matter not available at the time of the filing of the Petition for Certiorari on June 7, 1971.

The new matters are:

1. *The New York Times and Washington Post Cases.*

This Court took jurisdiction by certiorari in both of these cases on June 25, 1971, 403 U.S. ....., 91 S.Ct. 2270-1 and de-

cided them on June 30, 1971, 403 U.S. ....., 91 S.Ct. 2140. Both of these cases involve issues existing in the case at bar, (a) whether this Court would take jurisdiction by certiorari on judgments by the District Courts and Courts of Appeal *which were not final* (which this Court answered in the affirmative); (b) whether an injunctional order imposing a prior restraint upon communication on the basis of a Government allegation that prior restraint was necessary to protect the national interest in national security was permissible where the Government did not sustain its "heavy burden of showing justification for such restraint" (which this Court answered in the negative).

2. *Amended Civil Rule 22 of the District Court for the Northern District of Illinois.*

Civil Rule 22 was amended by the Judges of the District Court for the Northern District of Illinois on June 15, 1971, one week after the instant Petition for Certiorari was filed and served on the respondent District Judge. The amended Civil Rule 22 is set forth in GM's Brief in Opposition, (hereinafter called G.M. Brief), pp. 22-24.

3. *A communication of Chief Judge Robson of the District Court below to the Chicago Bar Association, dated June 24, 1971, in reply to a communication from the Chicago Bar Association to Judge Robson relative to Civil Rule 22.*

The original communication from the Bar Association to Judge Robson is referred to in the Petition for Certiorari, p. 21, N. 1, but was not available to petitioners at the time of filing the petition. Both communications are reproduced in Appendix E post, pp. 7a-14a and 15a-26a.

4. *Three orders of prior restraint against communications by plaintiffs and their counsel in class suits,* which

were entered in a 10-day period subsequent to the filing of this petition for certiorari, as follows:

June 16, 1971, Cast-Iron Pipe Cases, *Northern District of Alabama,* post, pp.* 1a-2a.

June 18, 1971, Moody v. Albemarle Paper Co., *Eastern District of North Carolina,* post, pp. 3a-4a.

June 25, 1971, Gypsum Cases, *Northern District of California,* post pp.* 5a-6a.

B. ARGUMENT

1. GM's Brief** argues that:

a) The District Court did not really make any ruling but only postponed ruling. (GM Brief, 5-6)

b) The District Court's order denying the motion for leave to communicate, consult and advise was not a "final decision suitable for review by way of certiorari". (GM Brief, 6)

c) The amendment of Civil Rule 22 "may have mooted the constitutional issues that Petitioners would raise." (GM Brief, 7)

d) Review by this Court of Civil Rule 22 is inappropriate because the rule was recommended by the Judicial Panel on Multidistrict Litigation, and because

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* Only material portions of the orders are printed.

** No Brief in Opposition has been filed by or on behalf of the Honorable William J. Campbell, District Judge, Respondent to the Petition for Certiorari in connection with the petitions for mandamus in the Court of Appeals; or by or on behalf of the District Court below, with relation to our attack by mandamus on Civil Rule 22, both as construed and applied, and on its face.

Copies of the Petition for Certiorari were served upon Judge Campbell and upon the Solicitor General. All the Judges of the District Court have taken note of the proceedings by way of appeal and mandamus in the Court of Appeals below, and have been advised of the filing of the Petition for Certiorari herein. (See Letter of Chief Judge Robson, post p. 23a.

District Courts had entered some orders modeled after the Judicial Panel recommended order, and one District Court in 1970 had adopted an analogous rule. (GM Brief, 8-10)

e) Petitioners should now go back to the District Court and resubmit their motion for leave to communicate, consult and advise without censorship (and presumably, if the District Court does not grant the motion, again seek review by way of appeal and mandamus). (GM Brief, 7)

2. General Motors' Brief does not dispute the assertions in the Petition for Certiorari that:

a) The District Court's denial of Petitioners' motion for leave to communicate, consult and advise with the Attorneys General of the States was a clear abuse of discretion (Pet. Cert. 3, 17); and was a denial of the First Amendment rights of communication, assembly and petition (Pet. Cert. 3-4), and of the Fifth Amendment right to due process (Pet. Cert. 4), of these Petitioners and the members of their class.

b) Civil Rule 22 is on its face a similar violation of such First and Fifth Amendment rights of Petitioners and the members of their class. (Pet. Cert. 19-22)

c) Civil Rule 22 is in conflict with four applicable lines of decision of this court. (Pet. Cert. 22-24)

d) This case is of great special intrinsic importance. (Pet. Cert. 24)

e) This case is of great and immediate public importance. (Pet. Cert. 24)

f) This case presents important questions of federal statutory and constitutional law which have not been, but should be, settled by this court. (Pet. Cert. 24)

g) The circumstances of this case call for the exer-

cise of this Court's power of supervision. (Pet. Cert. 24)

3. The District Court categorically by written order denied our motion for leave to communicate, consult and advise with the Attorneys General without submitting our communication in advance to the court (App. 44a). The court's remark in the colloquy that Petitioners would have leave to reinstate the motion after the ruling on the motion to strike the complaint was, of course, superfluous, since Petitioners could resubmit the motion at any time without leave. Moreover, counsel for Petitioners advised the court that they wanted to contact the Attorneys General while the motion to dismiss was pending "and before any decision one way or the other." The District Court refused. (GM Brief, 14)

Petitioners and their counsel have been (and still are) under the interdict of Civil Rule 22 since April 15, 1970. The Rule has already had a "marked impact on Petitioners' First Amendment rights" (*Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, note p. 418), since by the interdict and by the consequent inability to communicate, Petitioners have been seriously delayed in effective prosecution of the suit. Petitioners have no assurance that if resubmitted their motion would be granted; indeed, the amendment to Civil Rule 22, which we discuss *post* p. 7ff, shows that it will *not* be granted. (Cf. the observation of the Chief Justice, in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, n. p. 418, that this Court was not given any indication that the Court below would have acted any differently on application for a permanent injunction.) Petitioners contend that Rule 22 is unconstitutional on its face so that there could be no question of fact on this point. Petitioners have no remedy unless this Court grants

certiorari, since the Court of Appeals denies any right to appeal, and mandamus is always uncertain.

4. The contention of GM that only "final decisions [are] suitable for review by way of certiorari" (GM Brief, p. 6) is without merit. In both *New York Times* (No. 1873) and *Washington Post* (No. 1885) 403 U.S. ....., 91 S.Ct. 2140, certioraris were granted to review interlocutory orders. In *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, certiorari was granted to review a State Court interlocutory injunction (over Mr. Justice Harlan's objection because there had not been a *final State Court* judgment.)* The Chief Justice resolved the question of jurisdiction in favor of vindicating First Amendment rights. *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, n. page 418. *General Motors itself has applied to this Court for and has been granted certiorari from a non-final judgment of a Court of Appeals. General Motors Corporation* v. *United States*, 323 U.S. 373, 377, explicated in *Gillespie* v. *U.S. Steel Corp.*, 379 U.S., 153.

Of course, under 28 U.S.C. 1254(1), this Court has plenary jurisdiction to take over *at any stage* by certiorari any case once docketed in a Court of Appeals. This jurisdiction is liberally exercised in the interest of justice and expedition. *Turner* v. *City of Memphis*, 369 U.S. 350, 353-354. At the last term of this Court, there were over 20 certioraris granted from judgments and orders that were not final.**

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* This objection does not exist here, *because this Court may review by certiorari interlocutory judgments of U.S. Courts of Appeals.*

** U.S. Bulk Carriers Inc. v. Arguelles, 400 U.S. 810; U.S. v. White, 401 U.S. 745; United Mine Workers v. Railey, 401 U.S. 486; Sierra Club v. Morton, 401 U.S. 907; Hawaii v. Standard Oil, 401 U.S. 936; U.S. v. Campos Serrano, 401

5. The amendment of Civil Rule 22 did not moot the constitutional issues;* indeed, it exacerbated Petitioners' grievance. The first sentences of both the original Rule and the Amended Rule are in substance identical:

ORIGINAL CIVIL RULE 22	*AMENDED CIVIL RULE 22*
"In every action brought as a class action under Rule 23 of the Federal Rules of Civil Procedure,	"In every *potential* and actual class action under Rule 23, F.R.Civ.P.
no communication shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member who is not a formal party to the action	all parties are *hereby forbidden* directly or indirectly, *orally* or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action
until such time as an order may be entered by the court approving such communication."	without the consent of and approval of the communication by order of the Court." (Emphasis supplied)

** (Continued)
U.S. 936; Victory Carriers Inc. v. Law, 401 U.S. 936; S.E.C. v. Medical Committee for Human Rights, 401 U.S. 973; Childs v. Oregon, 401 U.S. 1006; U.S. v. Shields, 401 U.S. 1007; Reliance Electric Co. v. Emerson Electric Co., 401 U.S. 1008; Lauchli v. U.S., 402 U.S. 938; U.S. v. Zizzo, 402 U.S. 938; Chevron Oil Co. v. Huson, 402 U.S. 942; In re Pappas, 402 U.S. 942; Parisi v. Davidson, 402 U.S. 942; U.S. v. Pfizer, 402 U.S. 942; U.S. v. Holmes, 402 U.S. 969; S&E Contractors v. U.S., 402 U.S. 971; California Motor Transport Co. v. Trucking Unlimited, 402 U.S. 1008; N.Y. Times v. U.S., 403 U.S. ....., 91 S.Ct. 2140; Perry v. Sonderma, 402 U.S. ....., 91 S.Ct. 2226.

* A case will not be rejected because of supposed mootness in the ordinary sense where the public interest is involved, and
a) where the action of the court below sought to be reviewed is a continuing controversy, where the problem is "capable of repetition, yet evading review". *Moore* v. *Ogil-*

Thus the amended Rule *continues* the "universally abhorrent" total prior restraint, *continues* the "universally abhorrent" injunction against communication, and *continues* the "universally abhorrent" requirement for a license (i.e., a formal order of court approving the communication), and for censorship.

At this point the original Civil Rule 22 ended. It did not purport to limit the right of the District Court, in its discretion, to enter an order permitting written or *oral* communication, consultation and advice (as we requested).

6. Amended Civil Rule 22 *forbids (1) oral communication and (2) therefore, discussion.* It goes on to say (GM Brief 20):

> "Any such proposed communication *shall* be presented to the court *in writing,* with a designation or description of all addressees and with a motion and proposed order for prior approval by the court of the proposed communication and the proposed addressees." (Emphasis supplied.)

This is in clear conflict with the line of decisions culminating in *United Transportation Union* v. *State Bar of Michigan,* 401 U.S. 576 (see Pet. Cert. 22), which holds that the First Amendment gives persons the right to cooperate in helping and advising one another to act collectively by

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* (Continued)
vie, 394 U.S. 814-816. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, 515. *McGrain* v. *Daugherty,* 273 U.S. 135, 181-182; and/or
b) where as here it is assured that "the judiciary will have the benefit of deciding legal questions in a truly adversary proceeding, in which there is the "impact of actuality", and in which the contentiousness of the parties may be relied upon to bring to light all relevant considerations." *United States* v. *Johnson,* 319 U.S. 302, 304-305.

group legal action to obtain affordable and effective legal representation, and meaningful access to the courts. Petitioners' *oral speech* is no longer free and is barred by the Rule. Petitioners may only communicate *in writing,* by license, and after their proposed written communication has been approved by the court as censor. Private and confidential give-and-take discussion and mutual consultation are prohibited.

7. Amended Civil Rule 22 violates the "narrowest terms" and "vagueness" (Pet. Cert. 22) rules of applicable decisions of this Court. Thus, the amended Rule continues:

> "The communications *forbidden* by this Rule include *but are not limited to** (a) a solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; * * * and (d) communications from counsel or a party which *may* [*!*] *tend* [*!*] to *misrepresent* [*!*] the *status* [*!*], *purposes* [*!*] and *effects* [*!*] of the action, and of actual or *potential* court orders therein, which *may* [*!*] create *impressions* [*!*] *tending* [*!*], *without cause* [*!*] to *reflect adversely* [*!*] on any *party* [*!*], any counsel, the court *or the administration of justice* [*!*]." (Emphasis supplied.)

What could be more vague and fluid? How could vagueness be more compounded and treacherous? Not "misrepresent", not even "tend to misrepresent"; but "*may* tend to misrepresent"! What are meant by the phrases "status of the action", "purposes of the action", or of "potential"

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* The precise opposite of "narrowest terms" and "pinpointed objective"! *Carroll* v. *President and Commissioners of Princess Anne,* 393 U.S. 175, 183.

court orders? How could Petitioners do otherwise than guess at which is meant by "may [!] create impressions [!!] tending [!!!] without cause (?) to reflect adversely [!]" on General Motors, etc.? (Emphasis supplied.) Obviously, a good deal of what Petitioners assert and contend will be construed by General Motors to reflect adversely on it. If we have to apply to the court for a license to communicate, and to submit our proposed communication to the court for censorship, do we also have to satisfy the court that we have what the court deems "cause"? If the court thinks our showing of cause is inadequate, are we gagged? Is review by appeal or mandamus available?

This language in the Amended Rule violates Fifth Amendment due process. *Connally* v. *General Construction Co.*, 269 U.S. 385, 391. *United States* v. *Cardiff*, 344 U.S. 174, 176-177.

The foregoing injunctional language was entered *ex parte*. The request by the Chicago Bar Association to be heard was refused. (Letter of Chief Judge Robson, post pp. 23a-24a). It seems too obvious to require argument that the essential "balanced analysis and careful conclusions" do not exist. *Carroll* v. *President & Com'rs of Princess Anne*, 393 U.S. 175, 183. A rule "issued in the area of First Amendment rights must be couched in the *narrowest terms* that will accomplish the *pin-pointed* objective permitted by constitutional mandate and the essential needs of the public order." (Emphasis supplied.) *Carroll*, 393 U.S., 183.

Obviously, the foregoing language of the Amended Rule is in violation of the "narrowest terms" line of applicable decisions of this Court. (See Pet. Cert. 22).

8. It seems too obvious to require argument that the language quoted in paragraph 7 *supra* is in conflict with the line of cases which holds that the courts should not add

requirements to burden the private litigant beyond what is specifically set forth by Congress in the anti-trust laws. (Pet. Cert. 23)

9. Civil Rule 22 as originally adopted and as amended is in practical effect an injunction. The original rule (Pet. Cert. 9) contained no findings of fact purporting to meet the requirements for justification of an injunction. (See Pet. Cert. 23) The order of the District Court of June 15, 1971, adopting the Amended Rule, contains the following preamble (GM Brief 22):

> "In accordance with the unanimous action of all of the Judges of this Court in executive session on June 15, 1971, this Court finds that class actions under Rule 23, Federal Rules of Civil Procedure, are *subject to abuse* [!], intentional and inadvertent, unless procedures are devised and employed to *anticipate abuse* [!]. Among the *potential abuses* [!] of the class action processes are the following: (1) solicitation of direct legal representation of potential and actual class members who are not formal parties to the class action; (2) solicitation of funds and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; * * * and (4) unauthorized direct or indirect communications from counsel or a party, which *may* [!] *misrepresent* [!] the *status* [!], *purposes* [!] and *effects* [!] of the action and of Court orders therein, *may* [!] *confuse* [!] actual and potential class members, and create *impressions* [!] which *may* [!] *reflect adversely* [!] on the Court or the administration of justice. To *anticipate* [!] and prevent these abuses, this Court unanimously adopts the following order." (Emphasis supplied.)

It is obvious that this preamble does not find that litigants and their counsel in class actions under Rule 23 have in the past engaged in illegal conduct, and if not enjoined

will engage in such conduct (see Pet. Cert. 23); so that, treating the Amended Rule merely as an injunction, it is not supported by adequate (or indeed, *any*) findings.

10. *A fortiori:* To justify a prior restraint on First Amendment activity, it is not sufficient that the anticipated conduct be *merely* illegal. The "heavy burden of justification" imposed on Government (*New York Times*, 403 U.S. ....., 91 S.Ct. 2140, 2141, is higher by many orders of magnitude. The Government (here the District Court) must show by proof, not conjecture, surmise or conclusions, "a clear and present danger," overcoming "the very narrow right of the government to prevent", (Blackmun J. 403 U.S. ....., 91 S.Ct. 2140, 2165); a danger that "could clearly result in great harm to the nation"—"the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate"; "prolongation of the war and of further delay in the freeing of United States prisoners." (403 U.S. ....., 91 S.Ct. 2140, 2166) Since danger of such magnitude, although asserted and documented, was not *clearly* shown in *New York Times*, this Court (and correctly, it now appears) gave preference to the First Amendment rights, and *rejected prior restraint. New York Times*, 403 U.S. ....., 91 S.Ct. 2140. How then can amended Rule 22 be defended, when it is sought to be justified, not on *facts* showing a clear and present danger of great harm to the national interest, but on conjectures, surmise and conclusions upon a hypothetical "anticipation" of "potential abuses?"*

* It is noteworthy that *the only experiential basis* cited by GM (Brief 8) to support the claimed need for "universally abhorrent prior restraint", and by the Multidistrict Panel (Manual for Complex and Multidistrict Litigation §161) is a remark by a District Judge in *Kronenberg*, 281 F.Supp. 622, 625 (1968) that a letter had been sent out by

11. The last paragraph of amended Civil Rule 22 creates a supposed exception to the amended Rule in "terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391. This paragraph reads:

> "This rule does not forbid * * * (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not *have the effect of* [!] soliciting representation by counsel, or *misrepresenting* [!] the *status* [!], *purposes* [!] or effect [!] of the action and orders therein." (Emphasis supplied.)

This language does not really create an exception to or limitation on the previous impermissible catch-all. Communications occurring in the regular course of business, or in the performance of the duties of a public office or agency (such as the Attorney General) must still be

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* (Continued)
plaintiffs which irked the Judge because "inferences [!] might [!!] easily [!!!] be drawn from it which do not reflect [?] accurately the legal position of members of the class." (Emphasis supplied.) How frail a reed does colossal GM lean upon for support of its claim to gag these Petitioners!

The only previous case in point which we have been able to find squarely supports the right of a class suit plaintiff to solicit members of the class to come into the litigation. *Hormel* v. *U.S.*, 17 FRD 303, where Dimock, J. said, 17 FRD 304 "while the Government makes an assertion to the contrary, *I can see nothing wrong about the plaintiffs circularizing all others who have claims against the government.*" (Emphasis supplied) Judge Dimock cited no authority; apparently the question had never before been raised.

submitted to the court by motion in advance in writing for censorship and licensing by court order:

(1) if they might be construed to have the effect of soliciting representation by counsel; and/or

(2) if they might be construed to misrepresent [!] the status [!], purposes [!] or effect [!] of the action or court orders therein.*

Because of the vagueness of the language of amended Rule 22, every communication to a "public office or agency" which states the plaintiffs' view of the facts and/or the law, not previously censored and licensed by court order, will be subject to the charge by astute defense lawyers that it will have the effect of misrepresenting the status, purposes or effect of the action, and of orders therein. There is no room for inadvertence, error or difference of opinion. There is no room for give-and-take in oral discussion, or for brainstorming. The essence of effective mutual consultation is that strong opinions, highly partisan, quite possibly erroneous or inadequately supported, will be vigorously exchanged and argued in order to forge effective policy, strategy and tactics. (Compare, e.g., the private conferences of a multi-judge Court).

The Attorneys General are responsible men. They need no protection by "universally abhorrent prior restraint"

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* It is curious that "public office or agency" communications, as the amended Rule reads, would not seem to be forbidden even though they "may create impressions tending, without cause, to reflect adversely on any party, any counsel, the Court or the administration of Justice." *Quaere,* whether such communications to a "public office or agency" are permitted, not being forbidden, for the purpose of "solicitation of fees and expenses and agreements to pay fees and expenses," as distinguished from legal representation.

from being overreached by "solicitation of employment," or communications which might "have the effect of misrepresenting the status, purposes and effect of the action and orders therein." The Attorneys General are supremely capable of astutely making their own judgments as to what action should be taken by them in the interest of their States. There is no showing that any harm which might conceivably occur from improper unlicensed, uncensored communication could not be adequately redressed by the established after-the-fact processes.

12. Only unnecessary protraction, harm and damage could result from requiring these Petitioners to submit to the District Judge their motion challenging the constitutionality of the amended Rule. It is a re-enactment of the original Rule, with additional restrictions further and stringently limiting not only first amendment rights, but the District Judges' discretion too. The letter of Chief Judge Robson to the Chicago Bar Association (post, pp. 15a-26a) makes it perfectly clear that *all of the District Judges are in agreement, after considering the objections raised by the Chicago Bar Association* (post, p. 15a) *and by the Petition for Certiorari* (post, p. 23a) *that Civil Rule 22 as amended by their unanimous action* (post, pp. 15a, 16a) *is constitutional.* There is no disputed question of fact on our assertion of the unconstitutionality of the amended Rule on its face, which might be resolved differently on a resubmission. Therefore, reaffirmance of the considered judgment of all the District Judges that the amended Rule is constitutional will be no more than a formality. Compare the Chief Justice's observation in *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, n. p. 418:

> "[O]ur reading of the record leads to the conclusion that the issuance of a permanent injunction upon termination of these proceedings will be little more

than a formality. Moreover, the temporary injunction here, which has been in effect for over three years, has already had marked impact on Petitioners' First Amendment Rights."

CONCLUSION

The validity of amended Civil Rule 22, which is identical with the rule recommended to all the District Courts by the Multidistrict Panel, is a question of great immediate public importance, in view of the endemic entry of analogous "gag" orders which is now taking place all over the country (see post, pp. 1a-6a). It is ripe for examination and determination by the Court in this case.

Respectfully submitted,

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